

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





77-2147

To be argued by  
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

JESSE PUGH,

Petitioner-Appellant,

- against -

SUPERINTENDENT, CLINTON CORRECTIONAL  
FACILITY,

Respondent-Appellee,

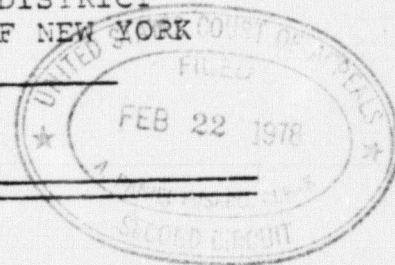
ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JESSE PUGH,

Petitioner-Appellant,

- against -

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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLEE

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Petitioner-appellant appeals from an order of the United States District Court for the Southern District of New York (Stewart, J.) dated November 10, 1977, denying, after a hearing, petitioner-appellant's application for a writ of habeas corpus. The District Court granted petitioner-appellant (hereinafter "petitioner") a certificate of probable cause.

Questions Presented

Was petitioner provided the effective assistance of counsel at sentencing?

Was his plea of guilty entered voluntarily and with complete understanding of the consequences?

Did he receive the sentence for which he had bargained?

#### Statement of Facts

Petitioner is presently incarcerated in the Connecticut State Jail at Somers (H.11)\* pursuant to a 1976 Connecticut conviction for larceny in the first degree.

The conviction which resulted in the instant application for habeas corpus relief was rendered on May 10, 1972 in the Westchester County Court of the State of New York (Couzens, J.). Petitioner entered a plea of guilty on April 10, 1972 to robbery in the second degree and was sentenced on May 10, 1972 to an indeterminate term of seven years imprisonment to run concurrently with time owed on a prior Pennsylvania conviction for aggravated robbery.

Petitioner was paroled from the New York sentence on January 6, 1975. He was declared delinquent as of April 10, 1975, the date of the robbery for which he was convicted in Connecticut.

\* Page references preceded by "H" refer to the minutes of the hearing below.



### Procedural History

Petitioner did not appeal his New York conviction. A letter written to the sentencing judge was deemed a motion to vacate sentence. By order dated August 8, 1972, the Westchester County Court (Couzens, J.) denied the motion on the ground that "the defendant does not allege any ground constituting a legal basis for this motion."

In May 1973, petitioner filed a habeas corpus application in the Southern District claiming that the Westchester County Court sentence involved a reneging on a pleas bargain and that he was receiving improper medical attention (United States ex rel Pugh v. Superintendent, Clinton Correctional Facility, 73 Civ. 1963).

The first claim was dismissed by Judge Arnold J. Bauman on June 8, 1973 for failure to exhaust state remedies.\*

Petitioner then moved to vacate his conviction in state court by a motion dated September 11, 1973. He alleged that his conviction was obtained in violation of the New York

\* The claim about medical treatment was severed and treated as a civil rights action. It was consolidated with another civil rights action brought by Pugh (Pugh v. People, 73 Civ. 55) and, upon motion by the state, was dismissed on the merits in a memorandum opinion by Judge Charles M. Metzner.



Criminal Procedure Law and the Fourteenth Amendment of the United States Constitution because his plea had been coerced by "representations with respect to a sentence of five years probation", because the trial judge promised five years probation because of his physical condition, and because counsel exerted impermissible pressure by stating that petitioner's physical condition was of utmost importance and that the petitioner must accept five years probation.

In his reply affidavit, petitioner claimed that he had been denied the effective assistance of counsel because of his attorney's part in the coerciveness of the plea.\*

The Westchester County Court (Couzens, J.) denied the motion on December 20, 1973, finding:

"This Court, at the time of the defendant's plea, stated, 'I was considering a Class D felony sentence. A Class D felony sentence would be from three to seven years in State's Prison with the possibility of probation if your physical condition can be determined on the sentencing date by a qualified

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\* It is therefore conceded that petitioner has exhausted his state remedies.



neurosurgeon; it that understood?' The defendant answered, 'Yes'.

"No promise of probation was made; it was merely stated as a possibility within the sentences available under the promise that the sentence would be no greater than that for a Class D felony. No report from the qualified neurosurgeon was presented for the Court's consideration at the time of sentencing. The plea was voluntarily given and the Court's promise on sentence was kept. The motion is, therefore, denied." (Emphasis in original).

A motion for leave to appeal to the Appellate Division, Second Department was denied on March 12, 1974 (Shapiro, J.).

Petitioner then brought this application for a writ of habeas corpus (74 Civ. 3887). Petitioner claimed irregularity in his return from Pennsylvania to New York,\* that he was promised probation in exchange for pleading guilty, and that his attorney did not supply the court with the necessary medical reports. Petitioner stated that "for reasons unknown the bargain was not honored and petitioner was not allowed to withdraw his plea."

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\* Petitioner was returned to Pennsylvania after his New York conviction to finish serving his Pennsylvania robbery sentence.

In a Memorandum dated June 5, 1975, the District Court (Stewart, J.) denied the petition finding that petitioner had been properly transferred from Pennsylvania to New York.\*

Petitioner then moved for a certificate of probable cause alleging for the first time that he had been deprived of the effective assistance of counsel at sentencing because counsel had failed to obtain the necessary medical documents.

In an order dated October 7, 1975, this Court remanded for an evidentiary hearing stating:

"Ordered that motion for a certificate of probable cause, for leave to proceed and for the assignment of counsel be and it hereby is granted, and the cause remanded to the district court for an evidentiary hearing on whether the appellant was rendered ineffective assistance of counsel at sentencing, It is further ordered that said motion for an injunction pending appeal be and it hereby is denied."

The

Petitioner entered a plea of guilty on April 10, 1972 in Westchester County Court. What occurred in relevant

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\* The most likely reason why the Court did not discuss the plea is that the petition contained almost entirely matter concerning the extradition.



part is as follows:\*

\* \* \*

Mr. Rakacky: (The Assistant District Attorney)  
. . . Mr. Pugh, you heard the application by  
Mr. Lerner? (defense counsel)

The Defendant: Yes.

\* \* \*

Mr. Rakacky: Have you had enough time to talk  
this matter over with your attorney?

The Defendant: Yes.

Mr. Rakacky: This is what you want to do?

The Defendant: Yes.

\* \* \*

Mr. Rakacky: And do you admit in the Village of  
Port Chester on or about December 21, 1971, each  
aiding and abetting the other and acting in  
concert with the co-defendant in this case,  
Samuel Ferguson, did forcibly steal certain  
property from one Viola Walker, a bank teller?

The Defendant: Yes.

Mr. Rakacky: Has anyone chreatened or forced you  
to plead guilty?

The Defendant: No.

Mr. Rakacky: You are entering this plea of guilty  
voluntarily?

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\* The plea minutes were introduced as the Court's Exhibit 3  
at the hearing below.

The Defendant: Yes.

Mr. Rakacky: ...Would your Honor place our conference regarding sentence on the record?

The Court: Mr. Pugh, in conference today with your attorney and the District Attorney, and the last time we had a conference, I stated that due to your physical condition I was considering a Class D felony sentence. A Class D felony sentence would be from three to seven years in State's Prison with the possibility of probation if your physical condition can be determined on the sentencing date by a qualified neurosurgeon; is that understood?\*

The Defendant: Yes.

The Court: However, if the presentence report is such that I cannot in good conscience keep this promise, I will so advise you and you will have the opportunity to withdraw this guilty plea and reinstate your not guilty plea to the indictment and go to trial on the case; do you understand that?

The Defendant: Yes, sir.

The Court: And if the pre-sentence report discloses prior convictions that warrant as a matter of law further and additional penalties, I will so advise you. You will have the right to withdraw the plea of guilty and reinstate your not guilty plea; is that understood?

The Defendant: Yes.

The Court: With that understanding, the plea of guilty is acceptable.

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\* In his brief to this Court, p. 16, petitioner flagrantly deletes that part of the Court's statement concerning the possibility of a three to seven year term in prison.



Mr. Rakacky: May I place on the record just to clarify. Your Honor indicated the maximum sentence for a "D" felony would be from three to seven years. The maximum would be anywhere from one to three, all the way to one to seven.

The Court: A "D" felony is a maximum sentence of seven years; do you understand that?

The Defendant: Yes.

The Court: I will put sentencing over for four weeks for a probation report. May 8th.

\* \* \*

#### The Federal Evidentiary Hearing

Petitioner, a man admittedly with a long history of felony convictions,\* testified that he was promised probation if he pleaded guilty and that he would receive probation if his attorney presented the Court with a medical report. His attorney and the Assistant District Attorney who prosecuted the case insisted that petitioner was told that probation was a mere possibility and depended both on the information in the pre-sentence report and his attorney's

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\* He is in Connecticut on a larceny, first degree conviction received after parole from the New York conviction at issue. (H.11) He was also convicted of aggravated assault in 1956 and a Pennsylvania bank robbery in 1962. (H. 12)

presenting medical evidence that he would be crippled for life.

At the beginning of the hearing, petitioner's counsel stated:

"As your Honor knows, your Honor, this case is here on a remand from the Second Circuit to determine the issue of, in effect, the assistance of counsel at the sentencing of the petitioner in a New York case in Westchester County." (H.2)\*

Petitioner testified that after the operation to remove the bullet, he was paralyzed from the waist down. (H.16) He was told by the doctor prior to entering his plea of guilty that "I would have to learn to live with limitations, and in his opinion it was doubtful that I would ever regain most of my physical abilities back. In other words, he said that I would be paralyzed." (H.17) The doctor was not able to tell petitioner that he would be paralyzed for life. (H.18, 22)

Petitioner testified that his co-defendant, Ferguson, told him that Ferguson's attorney told Ferguson that he, Pugh, would receive probation, in part because of his severe injury. (H.25) Petitioner presented neither Ferguson nor Ferguson's

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\* Petitioner's counsel did not claim that the entire plea was infected with a false promise until the post-hearing Memorandum of Law.



attorney to corroborate this testimony.

Petitioner further testified that his attorney, Mr. Lerner, told him that he would receive probation if he pleaded guilty (H.26-27) although he admitted that he was told that he could receive seven years. (H.26-27) Petitioner testified that Mr. Lerner told him that he would receive a "D" felony conviction "because in this manner, this would allow the judge the latitude of giving you the probation and you would receive no more than seven. The maximum, in other words, would be seven, but the important thing is this authorized the judge to be able to give and consider probation." (H.29)

Petitioner admitted that the Judge explained the same thing to him and that the Judge had not said at sentencing that he would be sentenced to probation (H.29) Probation was merely a possibility, and Mr. Lerner was required to obtain documents from the doctor with respect to petitioner's physical condition. (H.30)



Petitioner testified that prior to sentencing he discussed the plea with Mr. Lerner and he told him that he did not have the medical reports that the judge required. (H.34) He further claimed that Mr. Lerner had petitioner's mother and Miss Christine Smith "verify that everything was all right" and that he would receive probation. (H.36-37)\* According to petitioner, on May 10, 1972, the date of sentencing Mr. Lerner still had no medical reports (H.36) and consequently, he did not receive probation.

After sentencing, petitioner wrote the Judge and Mr. Lerner to get a change of position. (H.41)

Petitioner's post sentencing letters to Mr. Lerner and the Judge were introduced as Court Exhibits 9 and 10.

In his letter of May 13, 1972 to Mr. Lerner (Ex. 9), petitioner stated that his health was failing each day; that he wanted Mr. Lerner's help; that he did not want to return to

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\* Petitioner did not call his mother or Miss Smith as witnesses at the hearing.



prison in Pennsylvania; that he was afraid he would not receive a needed operation, that he hoped his sentence could be reduced; and that he wanted his belongings and an opportunity to talk with Mr. Lerner.

Exhibit 10 is a letter from petitioner to Mr. Lerner dated May 14, 1976 with an enclosed letter to be delivered to the Judge. Petitioner asked Judge Couzens to reconsider his sentence and stated specifically:

"I remember all too clearly that you stated if you could have found one good thing in my report you may have considered probation. I understand sir, because since I was twenty the year 1956, I have been incarcerated a great deal."

On recross-examination, petitioner admitted that he had never spoken to Ferguson's attorney and that Ferguson had no prior convictions. (H.49) He claimed that all that had to be done for him to receive probation was for Mr. Lerner to produce a doctor's letter explaining the status of his physical condition. (H.53) and that he attempted to withdraw his plea on May 8, 1972. (H.53-54) He further admitted that the post-sentencing letters to Mr. Lerner and the Judge did not mention the fact



that Mr. Lerner did not submit the required medical reports (H.57-58) and that he did not complain about Lerner's performance. (H.59)

The petitioner presented no other witnesses.

Joseph W. Rakacky, the Assistant District Attorney who prosecuted the case in 1972 testified that petitioner was caught as he fled the bank that he had robbed (H.68) and that as a multiple felony offender, petitioner could have received as much as 25 years to life. (H.94)

Mr. Rakacky was present at pre-plea discussions between Mr. Lerner and Judge Couzens (H.70) and testified that the Judge promised that he would give a maximum sentence of seven years and that anything less would depend on petitioner's probation report (H.72, 74).

In a letter dated February 8, 1972, Mr. Rakacky and the Court were informed by a doctor at Grasslands Hospital that petitioner could not appear in court because of his physical condition. (H.73)



Mr. Rakacky further testified that the Judge promised petitioner seven years as a maximum and that the Judge promised that if he was unable to give such a lenient sentence after reading petitioner's probation report, he would have allowed withdrawal of the plea. (H.74)

The intention of the medical report was to see whether petitioner would be bedridden or confined to a wheel chair for a long period of time, because only then would the Court not send the petitioner to prison. (H78, 88-89, 91)

Prior to sentencing, the Court did offer petitioner an opportunity to withdraw his plea of guilty, but petitioner persisted in having his plea of robbery, in the second degree remain in effect (H.75). Mr. Lerner prevailed on the Court to have the New York sentence run concurrently with the Pennsylvania sentence (H.76)\*

Sam Lerner, petitioner's attorney when his plea was entered and sentence rendered, had been practicing criminal law since 1957. (H. 97) He saw petitioner a number of times

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\* Mr. Rakacky was not asked about the submission of medical reports to the Court in May, 1972 on direct or on cross.



and spoke to him on the telephone (H.98) and made an investigation of the facts of the case and the law (H. 99).

Mr. Lerner testified that the situation that actually prevailed at the plea was "discussed fully" with petitioner. (H. 101) He had one or two conferences with the Judge on April 10, 1972 the date the plea was entered and the Judge agreed to a maximum of three to seven years with a possibility of probation. (H.102) Probation was only a possibility although a definite possibility (H.102) but it depended on the petitioner's probation report, a medical report (H.103) and the totality of the circumstances. (H.104)

In an attempt to obtain the medical information requested by the Court, Mr. Lerner wrote to D. Gang on April 12, 1972, two days after petitioner had entered his plea of guilty (H.105). The letter to Dr. Gang was entered as Respondent's Exhibit A. The letter states, in relevant part:

"Judge Couzens has requested that a complete medical report be submitted on Mr. Pugh for his consideration, since Mr. Pugh's permanent disabilities, if any, would be given great consideration by the Court in determining the type and degree of sentence that would be imposed by the Court."



The letter asks for a "prognosis as to permanency" [sic] and states that time is of the essence and asks for the doctor's immediate attention.

Mr. Lerner also wrote to a Dr. Roman (Respondent's Exhibit B) stating in part:

"One of the factors involved in the "plea" and the sentence to be imposed by the Court is the injuries and damages sustained by Mr. Pugh as a result of this incident...

Mr. Lerner asked for a report

"setting forth specifically your opinion as to the degree of permanent impairment and future disability sustained by Mr. Pugh as a result of his bullet wounds. If you cannot state your opinion with a "reasonable degree of medical certainty", then I would respectfully suggest that you submit your best 'educated guess' as to Mr. Pugh's permanent impairment and future disability."

Mr. Lerner also wrote to Grasslands Hospital (Respondent's Exhibit C) enclosing petitioner's authorization for release of his records and asking for a supplemental report.



The purpose of the medical report requested by the Court was to determine if petitioner would be crippled for life. (H.108-109) The Judge, to place petitioner on probation, required a report stating that petitioner would be crippled for life. (H.130) None of the doctors who had treated petitioner would provide such a report, although Mr. Lerner believed that the reports that he had obtained were sufficient to satisfy the Judge. (H.130-31).

Mr. Lerner had extensive discussions with petitioner "on each and every aspect of this matter" (H.110) and reviewed the entire negotiations with him. (H.110) He told petitioner that he could get anywhere from three to seven years in prison and "there was a possibility of probation only -- and I told him not to have his hopes set on probation -- but we would try." (H.111) He never told petitioner that he would get probation. (H.112)

Mr. Lerner presented the requested medical report to the Judge. He even thought that he had read it to the Judge



on May 8, 1972 (H. 112-13, 135, 139).\* Information about petitioner's medical condition was also in his probation report. (H.136) The Judge told Mr. Lerner that petitioner's probation report was bad (H.113) and that petitioner would receive a term of from three to seven years (H.116), since it was petitioner's third conviction, the second one involving a bank. (H.114)

Mr. Lerner went out and discussed the matter with petitioner, his mother and Christine Smith. (H.114)

Mr. Lerner did persuade the Judge to let the parole board determine petitioner's minimum\*\* and to set his sentence concurrent to time owed in Pennsylvania. (H.116-17) Mr. Lerner told everything to petitioner and fully explained everything to him. (116-17) Petitioner agreed to the arrangement and withdrew his motion to withdraw the guilty plea. (H.117)

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\* The letter of February 4, 1972 to Mr. Lerner from Dr. Roman stated that petitioner was unable to stand or walk and "hopefully may regain some ability to ambulate with braces" but that it was "impossible to determine diagnosis at this time".

The letter of April 14, 1972 to Mr. Lerner from Dr. Kenneth Gang stated that he believed a good deal of petitioner's weakness and sensory loss would be permanent but it was "too soon to say with certainty".

\*\* Had the Court set a minimum of 3 years, petitioner would not have been eligible for parole for 3 years. With the Board's setting the minimum, petitioner became eligible for parole after one year.



Petitioner never complained to Mr. Lerner about any alleged deficiencies. (H.118)

On cross-examination, Mr. Lerner explained that there was no procedure at that time for introducing the letters formally into evidence (H.121-22), that petitioner did not want to appeal though he had been advised of his right (H.123); and that the letters of Dr. Gang was shown to the Judge in chambers on May 8, 1972 as was the customary practice at that time. (H.135)

#### The Decision of the District Court

The Court denied the writ in a Memorandum Decision filed November 10, 1977. The Court, found, in relevant part:

"At the evidentiary hearing on July 9, 1976, there was conflicting evidence as to whether Pugh's counsel, Sam Lerner, had shown the neuro-surgeon's report to Judge Couzens at the sentencing proceeding.<sup>3</sup> Pugh testified that the medical reports were not presented to the judge; it was conceded that no medical reports had been admitted into evidence at the sentencing; and Judge Couzens' December 20, 1973 order denying Pugh's motion to vacate sentence stated that no neuro-surgeon's report was presented for his consideration at sentencing.



"However, Lerner testified at the hearing that he showed the updated medical reports to the sentencing judge, that there were in camera conferences at the sentencing proceeding, and that Pugh therefore, might not have witnessed the presentation. Also, there was testimony that Judge Couzens' December 30, 1973 order was made twenty months after the actual sentencing, suggesting that perhaps he had forgotten the incident. Judge Couzens was not called as a witness.

"Additionally, the neuro-surgeon's report introduced into evidence at this Court's hearing was dated April 14, 1972, about a month before sentencing. Also in evidence are letters from Pugh to Lerner and Judge Couzens dated a short time after sentencing, seeking to obtain reconsideration of his sentence. Neither of these letters mention a failure by Lerner to submit medical reports.

"Considering these and other facts contained in the records, and testimony at the hearing, the Court finds that petitioner has not shown that his counsel failed to present the requested medical reports at sentencing.

"Even assuming Lerner did fail to present to Judge Couzens the medical reports, this failure alone does not constitute ineffective assistance of counsel in violation to petitioner's Sixth Amendment's right, since it does not "shock the conscience of the court" nor "make the proceedings a farce and mockery of justice." LiPuma v. Commissioner Department of Corrections, No. 77-2006 (2d Cir. July 11, 1977); Rickenbacker v. Warden, Auburn Correctional Facility, 550 F. 2d (2d Cir. 1976); United States



v. Wright, 1976 F. 2d 376 (2d Cir.)  
cert. denied 338 U.S. 950 (1950).

"The testimony of Rakacky\* and Lerner indicates that Judge Couzens was willing to consider probation seriously only if Pugh was severely paralyzed for life. Therefore, failure to submit reports was harmless error since the medical reports did not indicate such severe disability. Their testimony also shows that Lerner vigorously represented petitioner at the time of plea and sentencing.

"Rakacky testified that Lerner, emphasizing petitioner's physical condition to Judge Couzens, sought probation for Pugh at presentence conference. Furthermore, Lerner obtained an indeterminate sentence for petitioner which allowed the Parole Board more flexibility in establishing his minimum length of imprisonment. Lerner also prevailed upon the judge to make Pugh's prison term run concurrently with a prior Pennsylvania sentence. Inasmuch as petitioner was a "persistent felon" who could have received a minimum of fifteen to twenty-five years, Lerner was effective in obtaining these considerations for Pugh.

"Accordingly, petitioner's application for habeas corpus relief on the grounds of ineffective assistance of counsel at sentencing is denied."

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\* Joseph Rakacky, the Assistant District Attorney who prosecuted petitioner.



### ARGUMENT

PETITIONER WAS PROVIDED THE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING. HIS PLEA OF GUILTY WAS ENTERED VOLUNTARILY AND WITH COMPLETE UNDERSTANDING OF THE CONSEQUENCES AND HE RECEIVED THE SENTENCE FOR WHICH HE HAD BARGAINED.

This Court remanded this matter to the District Court solely for an evidentiary hearing on the effectiveness of counsel at sentencing because of the apparent discrepancy between what the State Court stated at sentencing, that it would consider probation if a medical report was submitted, and the decision of the Court, twenty months after sentencing (Court's Exhibit 1), made with no input from counsel, denying petitioner's motion for an order vacating sentence and stating that no report had been submitted. Clearly an issue of counsel's competency at sentencing was raised by the papers before this court, when petitioner first applied for a certificate of probable cause.

Notwithstanding petitioner's claim about having been promised probation, the effectiveness of counsel at

sentencing was the only issue ordered to be tried by this Court. Indeed, at the hearing before the District Court, petitioner's counsel stated that this was the issue before the court. (H.2) It was not until the hearing was completed and post-hearing memoranda filed that counsel devised a new and different theory.

In any event, the evidence demonstrates overwhelmingly not only that petitioner was provided the effective assistance of counsel at sentencing but also that he was accurately apprised at every stage of his chances for probation, that he knew full well that he could be sentenced to seven years in prison and that the possibility of probation was merely that.

The issue is solely one of credibility and one resolved against petitioner by the District Court.

First, it must be remembered that petitioner had the burden of production and the burden of persuasion to prove by the preponderance of the evidence that his plea was entered involuntarily and unintelligently or that he was not provided the effective assistance of counsel at sentencing. United States



ex rel. Curtis v. Zelker, 466 F. 2d 1092 (2d Cir. 1972) cert. den. 410 U.S. 945 (1973); United States ex rel. Fitzgerald v. LaVallee, 461 F. 2d 601 (2d Cir.) cert. den. 409 U.S. 883 (1972). It was, therefore, his burden to produce as witnesses any number of people whom he claimed at the hearing or whom he claims now to this Court would have corroborated his story that no reports were submitted or that he was deluded into thinking that probation was a possibility. Petitioner could have called the Judge rather than relying on a finding made by the Judge twenty months after the occurrence and made without a hearing. He could have called his co-defendant Ferguson and Ferguson's attorney, both of whom petitioner claims assured him he would receive probation.

He could have called his mother and his friend, Christine Smith, who admittedly were present when Mr. Lerner and petitioner discussed the sentencing. He could have called any number of Assistant District Attorneys or the Assistant Attorney General whom petitioner claims support his position that no medical report was submitted.\* Petitioner called none

\* Contrary to petitioner's assertion in this Court, Assistant District Attorneys Palazzolo & O'Donnell never stated that no medical reports were supplied and had no occasion in their affidavits to consider the issue one way or the other since the issue was not raised. Assistant District Attorney Gruber and Assistant Attorney General Spiegel in stating that no medical reports were given, said they were relying on Judge Couzen's decision of December 20, 1973, but as will be shown post that decision is outweighed by the live testimony at the hearing below.



of these people as witnesses at the hearing below. His claim that he was promised probation if a medical report was submitted, no matter what the report said and his claim that he was misled is bolstered only by his own testimony, the testimony of a four times convicted felon, and wild conjecture.

Petitioner's attempt to bolster his claim with the state court's finding that no medical report was submitted fails because the statute on which he relies, 28 U.S.C. § 2254(d) calls for a presumption of correctness only where the finding was made after an evidentiary hearing. No such hearing was had before the decision of the court of December 20, 1973. It is quite clear that once a federal hearing is ordered and it has occurred, that the findings of the state court are reopened for reconsideration and lose their presumptive correctness. See, Suggs v. LaVallee, \_\_\_ F. 2d \_\_\_, Docket No. 77-2053, slip op. at 1323 (2d Cir. Jan. 27, 1978). Once the hearing was ordered in the District Court, it was petitioner's burden to prove his case with witnesses. This he failed to do and he cannot hold up a state court finding not based on a hearing as more correct than the live testimony heard by the District Court.

The record and the testimony below clearly demonstrate what happened. Petitioner was in serious physical condition because he was shot during the bank robbery for which he was convicted. The judge was concerned that he might be paralyzed or



confined to a wheel chair. The Doctor stated in February, 1972 that petitioner might well be paralyzed. Even now, petitioner claims before this court that he is a poor, pitiable paralyzed creature. (See, e.g. Brief, p. 29). Only if petitioner were paralyzed or crippled for life was the Judge willing to sentence him to probation because putting a paralyzed man in prison would have been cruel and unusual punishment. In February, 1972, before sentencing, petitioner was in such bad shape that he could not even come to court.\*

The record at plea was explicit. There was a chance that petitioner would receive probation. There was a better chance that he would receive up to seven years in prison, which itself was considerably less than petitioner could have received had he gone to trial and been convicted as a persistent felony offender. It is undisputed that petitioner was caught in the act of robbing the bank and that he had two prior felony convictions. The judge was explicit at the time that the plea was

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\*It is clear that the state court, when it said no medical reports were submitted, in its decision of December 20, 1973, meant that no reports were submitted that stated that petitioner would be paralyzed for life.

\*\* In any event, petitioner has a great deal of temerity to claim now that he should have been given probation because of his physical condition in 1972 when he was, after all paroled in 1975, and then was in such good physical condition that he immediately could rob yet a third bank in a third State.



entered that petitioner could very well end up in prison for seven years. It was reiterated at the time that petitioner entered his plea. It was also forcefully told him that probation would depend not only on a medical report but also on his probation report.\*

Petitioner's claim that he was deceived into believing that probation was a real possibility when it was not is disingenuous at best. His attorney and the judge repeatedly told him not to count on probation and that it was only a possibility. He himself knew that his physical condition was serious. He himself repeatedly complained for years afterward, including in actions started in the District Court, that he needed serious medical attention. His claim that it was an utter impossibility that the Court should think he could have been paralyzed for life when he walked into the courtroom at the time he entered his plea is utterly without merit. It was never defined exactly what was meant by paralysis, and it was clear that petitioner could, even at sentencing, barely walk on his own. On the basis of what the Judge told petitioner when the plea was entered and what Mr. Lerner repeatedly told petitioner, the Judge was well within the parameters of expectation to impose on petitioner a seven year sentence.\*\*

\*What occurs at plea and what is recorded at the minutes of that plea is a "formidable barrier in any subsequent collateral proceedings", Blackledge v. Allison, \_\_\_\_ U.S. \_\_\_\_, 52 L.Ed 2d 136, 147 (1977) which petitioner has not overcome.

\*\* Petitioner was to be allowed to withdraw his plea only if the Court imposed more than a seven year sentence.



Even if petitioner had a mistaken subjective impression of his possible sentence because of conferences with Mr. Lerner, he would have no grounds for setting aside his plea. United States ex rel. Curtis v. Zelker, supra; United States ex rel. Scott v. Mancusi, 429 F. 2d 104 (2d Cir., 1970) cert. denied 402 U.S. 909 (1971). Here, however, if petitioner did have a mistaken subjective impression of the possible sentence it was not because of counsel but because of his own fancy. Nowhere does it say that petitioner's fancy will result in the vacating of a plea.

Petitioner may not gain relief by claiming that he entered his plea with the thought that he was going to walk out of the court on probation. A petitioner's expectation of leniency is insufficient to justify the withdrawal of a plea or any other relief by means of federal habeas corpus. United States ex rel. Curtis v. Zelker, supra; United States ex rel. Scott v. Mancusi, supra. Petitioner presents nothing but his own fanciful exaggeration and strident demands.

Petitioner demonstrated absolutely no surprise in his letters to the Court and to his attorney immediately after sentencing. He may have begged for reconsideration and for leniency but he was clearly not surprised that he had received



the seven years that he had been promised. Such lack of surprise weighs heavily against his claim. United States ex rel. Sniffen v. Follette, 439 F. 2d 1082 (2d Cir., 1971); United States ex rel Bullock v. Warden, 408 F. 2d 1326 (2d Cir., 1969) (defendant wrote to trial court but did not claim that she had been promised lighter sentence); United States ex rel McGrath v. LaVallee, 348 F. 2d 373 (2d Cir., 1965) cert. denied 383 U.S. 952 (1966).

Petitioner has not even demonstrated that he did have a mistaken impression of what his sentence would be. He admitted that he knew he could receive a seven year sentence. He certainly has not proved by the necessary objective proof that any subjective impression was justified. See, United States ex rel. Curtis v. Zelker, supra; Mosher v. LaVallee, 491 F. 2d 1346 (2d Cir.) cert denied 416 U.S. 906 (1971).

The test for determining the voluntariness of a guilty plea is whether the defendant was aware of the actual sentencing possibilities. Caputo v. Henderson, 541 F. 2d 979 (2d Cir. 1976). Petitioner could not have helped being aware of the possibilities and so admitted at the hearing below (H. 26-30) It is quite clear that he understood the minimum and maximum



sentences possible. United States ex rel Hill v. Ternullo, 510 F. 2d 844 (2d Cir., 1975).

There is no problem here under Santobello v. New York, 404 U.S. 257 (1971). The promises made to petitioner were made known to him by the Court and his attorney. He was apprised by his attorney that he could get probation only if he was going to be paralyzed for life, which was a possible condition.\*

Nor was petitioner denied the effective assistance of counsel. Counsel provided the medical reports that the Court required. He worked quite strenuously and effectively for petitioner by persuading the Court to run petitioner's sentence concurrently with the time he owed in Pennsylvania and to not set a three year minimum. The Court below correctly found that Mr. Lerner's representation did not "shock the conscience of court" nor "make the proceedings a farce and mocking of justice." LiPuma v. Commissioner Department of Correction, 560 F. 2d 84 (2d Cir.) cert denied \_\_\_\_ U.S. \_\_\_\_ (1977); Rickenbacker v. Warden, Auburn Correctional Facility, 550 F. 2d 62 (2d Cir. 1975); United States v. Wight, 176 F. 2d 376 (2d Cir.) cert denied, 338 U.S. 950 (1950).

It is utterly incredible to believe that petitioner was present in open court barely on his own locomotion for all to see, was told there of a possible seven year sentence by the judge and was later told this again by counsel and that he still believed that the Court would put him on probation merely by receiving medical reports about petitioner's medical condition. If all that the Court wanted was a medical report about petitioner's condition, it could merely have used its eyes.



Even assuming that petitioner's claim of a nefarious plot by the court and counsel to deceive him into pleading guilty based on an impossible condition subsequent was properly before the District Court for a hearing, that hearing was held just as the Court suggested in Blackledge v. Allison, *supra*. Petitioner had a "'full opportunity for presentation of the relevant facts' Harris v. Nelson, 394 U.S. 286, 298, 22 L. Ed 2d 281, 89 S. Ct. 1082" Blackledge v. Allison, 52 L. Ed 2d at 152. He took advantage of that opportunity as he thought best. He failed to prove that his plea was involuntary or the product of deceptive and false promises of an impossible probation, and the decision of the District Court finding that he was adequately represented should be affirmed.\*

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\* Even if this Court were to find that petitioner was somehow deceived, it is expressly within the state court's discretion to determine where the plea bargain should be enforced or whether the plea withdrawn. United States ex rel. Selikoff v. Commissioner of Corrections, 524 F. 2d 650 (2d Cir. 1975)

In any event, even if petitioner had received probation, it would have been properly revoked by his subsequent Connecticut conviction for larceny and he would be in the same exact position as he is now, with the balance of his sentence owed to New York State.



CONCLUSION

THE ORDER OF THE DISTRICT COURT  
DISMISSING THE PETITION SHOULD BE  
AFFIRMED IN ALL RESPECTS.

Dated: New York, New York  
February 21, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Respondent-  
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Assistant Attorney General  
of Counsel



STATE OF NEW YORK )  
 : SS.:  
COUNTY OF NEW YORK )

WILLIAM RODRIGUEZ , being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 22nd day of February , 1978 , he served the annexed upon the following named person :

LAWRENCE STERN, ESQ.  
11 Monroe Place  
Brooklyn, New York 11201

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

William Rodriguez

Sworn to before me this  
22nd day of February , 1978

David L. Burt  
Assistant Attorney General  
of the State of New York



